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Attorneys for Post-Effective Date USA Capital Diversified Trust Deed Fund, LLC

**UNITED STATES BANKRUPTCY COURT**  
**DISTRICT OF NEVADA**

In re:  
  
USA COMMERCIAL MORTGAGE  
COMPANY,  
  
USA CAPITAL REALTY ADVISORS, LLC,  
  
USA CAPITAL DIVERSIFIED TRUST DEED  
FUND, LLC,  
  
USA CAPITAL FIRST TRUST DEED FUND,  
LLC,  
  
USA SECURITIES, LLC,  
  
Debtors.

Case No. BK-S-06-10725-LBR  
Case No. BK-S-06-10726-LBR  
Case No. BK-S-06-10727-LBR  
Case No. BK-S-06-10728-LBR  
Case No. BK-S-06-10729-LBR

**CHAPTER 11**

Jointly Administered Under  
Case No. BK-S-06-10725 LBR

**OBJECTION OF USACM TRUST TO  
AUGUSTINE TUFFANELLI FAMILY  
TRUST'S CLAIM FILED IN WRONG  
DEBTOR'S CASE; OBJECTION OF  
DTDF TO PROPOSED ALLOWANCE  
OF CLAIM; AND CERTIFICATE OF  
SERVICE**

**Affects:**

- ☐ All Debtors
- ☒ USA Commercial Mortgage Company
- ☐ USA Capital Realty Advisors, LLC
- ☒ USA Capital Diversified Trust Deed Fund, LLC
- ☐ USA Capital First Trust Deed Fund, LLC
- ☐ USA Securities, LLC

Hearing Date: October 15, 2007  
Hearing Time: 9:30 a.m.

Augustine Tuffanelli Family Trust ("ATFT") filed Proof of Claim No. 10725-00090 against USA Commercial Mortgage Company ("USACM") in the amount of

1 \$100,000.00. The USACM Liquidating Trust (the “USACM Trust”) hereby objects to  
2 ATFT’s claim. The basis for the claim is shown on the face of the proof of claim and in  
3 the attachment as an investment in USA Capital Diversified Trust Deed Fund, LLC  
4 (“DTDF”). Accordingly, it is a claim that was incorrectly filed in the USACM case. The  
5 USACM Trust respectfully requests that this claim be disallowed as a claim against  
6 USACM. Although DTDF has not yet filed a formal proof of claim against USACM, and  
7 there is no deadline for it to do so, DTDF has informally asserted a claim in excess of  
8 \$100 million and the parties have participated in one unsuccessful mediation on this and  
9 other issues. Because DTDF does assert a significant claim against USACM, any claim  
10 held by ATFT against USACM solely on account of the investment in DTDF is derivative  
11 of DTDF’s claims against USACM, and ATFT may not prosecute such claims on ATFT’s  
12 own behalf.

13 In *In re Van Dresser Corp.*, plaintiff was a shareholder of Van Dresser, which  
14 owned two subsidiaries.<sup>1</sup> The president of Van Dresser looted the subsidiaries, ultimately  
15 forcing them and Van Dresser into bankruptcy. The plaintiff had guaranteed \$1.125  
16 million in loans to the debtor, and had to repay them when debtor defaulted. Plaintiff then  
17 sued the debtor’s principal, and two other defendants (who he alleged aided and abetted  
18 the corporate looting) for various torts, including conversion, breach of fiduciary duty, and  
19 civil conspiracy.

20 The court stated that a debtor’s trustee has the exclusive right to assert a debtor’s  
21 claims, and that a claim belongs solely to the debtor’s estate if the debtor could have raised  
22 the claim at the commencement of the bankruptcy case.<sup>2</sup> Additionally, if a judgment  
23 against a defendant by either the debtor or another party asserting the debtor’s claim

24 <sup>1</sup> *In re Van Dresser Corp.*, 128 F.3d 945 (6<sup>th</sup> Cir. 1997).

25 <sup>2</sup> *Id.* at 947 (citing *In re Educators Group Health Trust*, 25 F.3d 1281, 1284 (5<sup>th</sup> Cir. 1994); see  
26 also *In re Real Marketing Services, LLC*, 309 B.R. 783 (S.D. Cal. 2004) (citing *Van Dresser* with  
approval in a case involving an LLC debtor).

precludes the other from recovery, then the claims are not independent of each other and belong exclusively to the debtor.<sup>3</sup>

Thus, because both the plaintiff and the debtor corporation could state claims for damages against the defendants, but only one could recover on those claims, by default the claims were exclusively property of the Van Dresser trustees.<sup>4</sup> In order for a plaintiff to bring a claim, either the trustee must have truly abandoned the claim, or the plaintiff must be able to allege a distinct and specific injury.<sup>5</sup>

Similarly, in *In re Real Marketing*, the debtor had attempted to enter into an asset purchase agreement that specifically included the assumption of debt owed to the debtor's managing member. The agreement fell through, and after the managing member filed an involuntary petition for relief against the debtor, the managing member asserted various causes of action against the purchasing company, including contract claims, debt assumption claims, misrepresentation claims, and interference claims.<sup>6</sup> The court, however, found that all of the claims involved both the debtor's managing member and the debtor itself, and thus the right to pursue all of the causes of action resided with the trustee.<sup>7</sup>

DTDF further objects to any allowance of ATFT's claim as a claim against the DTDF estate. DTDF has determined that ATFT has an allowed proof of interest in the DTDF case in the amount of \$96,094.65 that roughly corresponds to the ATFT claim.

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 948.

<sup>5</sup> *Id.* at 949 (for example, a claim for the attorneys' fees plaintiff incurred defending the suits on the guaranty).

<sup>6</sup> *In re Real Marketing*, 309 B.R. 783, 786-87 (S.D. Cal. 2004).

<sup>7</sup> See also *In re Ionosphere Clubs, Inc.*, 156 B.R. 414 (S.D.N.Y. 1993) (courts determine whether action is individual or derivative based on state law, and the preferred shareholders breach of fiduciary duty claims were derivative per Delaware law); *In re Van Dresser*, 128 F.3d at 947 ("whether a creditor has sole right to a cause of action is determined in accordance with state law").

1 This objection does not seek to prejudice the rights of ATFT as a DTDF member to  
2 recover from the DTDF estate on a pro rata basis on account of ATFT's membership  
3 interest in the amount of \$96,094.65. ATFT shall retain an interest in DTDF in the  
4 amount of \$96,094.65, as reflected in the books and records of DTDF, and ATFT is  
5 entitled to receive distributions on a pro rata basis with all other DTDF members.

6 Accordingly, the USACM Trust and DTDF seek entry of an order that will disallow  
7 the ATFT's claim against USACM, disallow any proposed allowance of the ATFT's claim  
8 in the DTDF case, and appropriately allow ATFT to retain an equity interest in DTDF in  
9 the amount of \$96,094.65 as reflected in the books and records of DTDF as of April 13,  
10 2006.

11 This objection is made pursuant to Bankruptcy Code section 502, Federal Rule of  
12 Bankruptcy Procedure 3007, and Local Rule of Bankruptcy Practice 3007.

13 Dated: September 14, 2007.

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served via first class mail, postage prepaid, addressed as set forth below, on this 14th day of September, 2007 to:

Augustine Tuffanelli Family Trust  
Augustine Tuffanelli Trustee  
c/o Thomas R Brooksbank  
689 Sierra Rose Drive, Suite A2  
Reno, NV 89511

By /s/ Patricia M. Kois  
Patricia M. Kois, Lewis and Roca LLP